No. 79-4

In the Supreme Court of the United States

OCTOBER TERM, 1979

JASPER F. WILLIAMS, M.D. AND EUGENE F. DIAMOND, M.D.,

Appellants,

and

ARTHUR F. QUERN, Director Illinois Department of Public Aid

Appellant,

and

THE UNITED STATES

Appellant,

vs.

DAVID ZBARAZ, M.D., MARTIN MOTEW, M.D., on their own behalf and on behalf of all others similarly situated; CHICAGO WELFARE RIGHTS ORGANIZATION, an Illinois not-for-profit corporation, and JANE DOE, on her own behalf and on behalf of all others similarly situated,

Appellees.

On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF AMICUS CURIAE OF THE NATIONAL RIGHT TO LIFE COMMITTEE, INC., FOR APPELLANTS WILLIAMS AND DIAMOND

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NOTE

This Brief Amicus Curiae is filed with the consent of all parties to this Appeal. A letter from each attorney stating this consent has been filed herewith with the Clerk of this Court.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL RIGHT TO LIFE COMMITTEE, INC.

The National Right to Life Committee, Inc. is a non-profit organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. The National Right to Life Committee, Inc. is comprised of a Board of Directors representing 51 state affiliate organizations and more than 1,000 local chapters made up of individuals from every race, denomination, ethnic background and political belief. It engages in various political, legislative, legal and educational functions to protect and promote the concept of the sanctity of human life.

The members of the National Right to Life Committee, Inc. have been the prime supporters of laws restricting government funding of abortions to only those instances in which the mother's life is in danger. As opponents of abortion on demand, taxpayer funding of abortion is repugnant to their beliefs. The Hyde Amendment to the appropriations bill for the Department of Health, Education and Welfare and the Illinois limitation on state funding of abortion herein are the results of lobbying, in great part, by the members of the National Right to Life Committee and its affiliates. By means of this brief, the National Right to Life Committe seeks to advance these interests by supporting the legality of the abortion funding restrictions to be reviewed herein.

BRIEF AMICUS CURIAE

NOTE

The Questions Presented and The Statement of the Case are omitted from this Amicus Curiae Brief since they are amply stated in the Appellant Brief of Jasper F. Williams, M.D. and Eugene F. Diamond, M.D.

SUMMARY OF ARGUMENT

The primary issue of the appeal is, simply stated, whether the government is required by the Constitution or Title XIX of the Social Security Act, because of its interest in maternal health, to pay for abortions for indigent women. This issue is one properly left to legislative resolution and this Court should not determine the wisdom of an enactment which provides government funds for abortions in certain enumerated instances.

The right of privacy has been interpreted by this Court to extend to a woman's right to decide whether or not she desires an abortion. This right is not the same as the right to have the government pay for that abortion. The latter cannot be said to be part of the right of privacy. The state is under no obligation to put any citizen in a financial position to exercise a fundamental right, whether it be the right to have an abortion, to travel, to attend a private school, or to exercise religious freedom.

In addition, failing to provide government funds for the rich, while providing it for the poor, does not violate equal protection nor does providing funds for abortions to treat women with certain life threatening conditions discriminate invidiously against other women who are demanding abortion funds.

Since the right to have taxpayers pay for abortions is not a fundamental right, only a rational basis is required to uphold the instant abortion funding restrictions. The government interests in

childbirth, fiscal frugality, maternal health, and neutrality on abortion provide an adequate justification for such laws.

The Social Security Act represents a system of state/federal cooperation. As a result, the Medicaid Act does not mandate that the states fund any abortions as a condition to participate in the program particularly when federal reimbursement is denied.

Assuming that the federal government's restriction on abortion funding is unconstitutional, the Appropriations Clause of the United States Constitution prohibits this Court from ordering payment for abortions beyond the limitations established by Congress.

ARGUMENT

I

The Congressional and Illinois Limitations on Government Funding of Abortions for the Indigent Do Not Violate the Fourteenth Amendment to the United States Constitution.

Both Congress[1] and Illinois[2] have enacted restrictions on payment of government funds for abortions for indigent women through Title XIX (The Medicaid Provision) of the Social Security

1. §210 of Pub. L. 95-480, 92 Stat. 1586 (1978):

"None of the funds provided for in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians."

2. P.A. 80-1091, Ill. Rev. Stat. ch. 23, §5-5 (1977 Supp.):

"The Illinois Department, by rule, shall determine the quantity and quality of

(continued)

Act. Such restrictions are typical of those adopted by many states who have attempted to limit abortion funding to those with some medical justification. The funding limitations, however, have varied widely with many states limiting abortion funding to abortions necessary to preserve the life of the mother. See, NOTE, "Limiting Public Funds for Abortions: State Response to Congressional Action", 13 Suffolk U.L.R. 923, 943-945 (1979). It is the government's right to control the expenditure of tax money that is under attack in the instant case.

(1) THE WOMAN'S RIGHT OF PRIVACY

In *Roe v. Wade,* 410 U.S. 113 (1973), this Court held that the

the medical assistance for which payment will be authorized, and the medical services to be provided, which may include all or part of the following:... but not including abortions, or induced miscarriages or premature births, unless, in the opinion of the physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, Ill. Rev. Stat. ch. 23, § 6-1 (1977 Supp.):

"Nothing in this Article shall be construed to permit the granting of financial aid where the purpose of such aid is to obtain an abortion, induced misscarriage or induced premature birth unless, in the opinion of a physician, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a live viable child and such procedure is necessary for the health of the mother or her unborn child."

P.A. 80-1091, Ill. Rev. Stat. ch. 23, §7-1 (1977 Supp.):

"Aid in meeting the costs of necessary medical, dental, hospital, boarding or nursing care,...except where such aid is for the purpose of obtaining an abortion, induced miscarriage or induced premature birth unless, in the opinion of the physican, such procedures are necessary for the preservation of the life of the woman seeking such treatment, or except an induced premature birth intended to produce a viable child and such procedure is necessary for the health of the mother or her unborn child."

right of personal privacy included the right of a pregnant woman to decide whether or not to have an abortion. Therefore, this Court invalidated a Texas statute which prohibited all abortions except those procured for the purpose of saving the life of a mother, *Roe v. Wade, supra*, 410 U.S. at 164. In reaching this decision, the Court stated that during the first trimester of pregnancy, "the attending physician, in consultation with his patient, is free to determine, without regulation by the state, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the decision may be effectuated by abortion free of interference by the state." *Roe v. Wade, supra,* 410 U.S. at 163.

In the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), the U.S. Supreme Court, among other things, struck down Georgia's abortion statute which required that the abortion must be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. *Doe v. Bolton, supra,* 410 U.S. at 194. After noting that such a requirement is not imposed on the performance of nonabortion surgery, *Doe v. Bolton, supra,* 410 U.S. at 193, the Court found that it violated equal protection of laws because it was not "based on differences that are reasonably related to the purposes of the act in which it is found." *Doe v. Bolton, supra,* 410 U.S. at 194.

In interpreting the *Roe v. Wade* and *Doe v. Bolton* decisions together, the Eighth Circuit in *Word v. Poelker*, 495 F 2d 1349, 1350-51 (8th Cir. 1974), found the following principles:

(1) The "fundamental" right of privacy includes the abortion decision. *Roe v. Wade, supra,* 410 U.S. at 153-156.

(2) Even so, no woman has a right to an abortion "at whatever time, in whatever way and for whatever reason she alone chooses;" there is no right to abortion on demand. *Roe v. Wade, supra,* 410 U.S. at 153, *Doe v. Bolton, supra,* 410 U.S. at 189.

(3) The state interest in protecting the health of the pregnant woman and the separate interest of protecting potential human life become compelling at certain points in the pregnancy term (at the end of the first and second trimesters respectively) then and there affording the state the opportunity to reasonably regulate the abortion procedure. *Roe v. Wade, supra,* 410 U.S. at 162-164; *Doe v. Bolton, supra,* 410 U.S. at 194-195.

(4) The state regulation must be reasonably and legitimately related to the recognized state interest set out above. *Roe v. Wade, supra,* 410 U.S. at 162-166. *Doe v. Bolton, supra,* 410 U.S. at 194-195.

(5) Prior to the compelling points (during the first trimester of the pregnancy term) the abortion decision and its effectuation is "inherently, and primarily a medical decision, and basic responsibility for it must rest with the physican." *Roe v. Wade, supra,* 410 U.S. at 166. See also *Doe v. Bolton, supra,* 410 U.S. at 192-200.

Early cases interpreting *Roe v. Wade* and *Doe v. Bolton* overreacted to these decisions and held that absolutely no regulation of the abortion decision or its effectuation in the first trimester was constitutional. See *Arnold v. Sendak*, 416 F. Supp. 22 (S.D. Ind. 1976), *aff'd.*, 429 U.S. 968 (1976); *Coe v. Gerstein*, 517 F 2d 787 (5th Cir. 1976), *aff'd.*, 428 U.S. 901 (1976); *Friendship Medical Center v. Chicago Board of Health*, 505 F 2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Word v. Poelker, supra; Doe v. Zimmerman*, 405 F. Supp. 534 (M.D. Penn. 1975); *Hallmark Clinic v. North Carolina Department of Human Resources*, 380 F. Supp. 1153 (E.D.N.C. 1974); *Doe v. Rampton*, 366 F. Supp. 189 (D. Utah 1973).

This Court, however, in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), reversed this trend by holding that not all abortion regulations that apply to the first trimester are unconstitutional and that regulations dealing with abortion are not unconstitutional merely because the state does not impose similar burdens on other medical procedures. *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978). Abortion, unlike other medical procedures, involves the termination of potential human life. *Maher v. Roe*, 432 U.S. 464 (1977).

This view is supported by other recent Supreme Court decisions which have emphasized that the abortion decisions, while recognizing a constitutionally protected interest "in making certain kinds of important decisions" free from governmental compulsion, *Whalen v. Roe*, 429 U.S. 589 (1977), are "not absolute." *Carey v. Population Services International*, 431 U.S. 678 (1977). "As *Whalen* makes clear, the right in *Roe v. Wade, supra,* can be understood only by considering both the woman's interest and the nature of the state's interference with it. *Roe* did not declare an unqualified 'constitutional right to an abortion...' Rather, the right protects the woman from *unduly burdensome* interferences with her freedom to decide whether to terminate her pregnancy (emphasis supplied)." *Maher v. Roe, supra,* 97 S. Ct. at 2382. In addition, "not all distinction between abortion and other procedures is forbidden." *Bellotti v. Baird I,* 428 U.S. 132, 145 (1976). The constitutionality of such distinction will depend upon the degree and the justification for it. *Bellotti v. Baird I, supra,* 428 U.S. at 145.

Thus, three tests have been established by this Court to determine whether or not abortion regulations are constitutional. First is whether or not the regulations effect the abortion decision or its effectuation. Where the obstacle does not impact upon the woman's freedom to make a constitutionally protected decision, or if they merely make the physicians work more laborous or less independent without any impact on the patient, *Whalen v. Roe, supra,* 429 U.S. at 604, the regulations are evaluated under relaxed standards of scrutiny and the state is afforded broader power to encourage actions thought to be in the public interest. These regulations are subject to the "less demanding test of rationality," *Maher v. Roe, supra,* 97 S. Ct. at 2385, and thus usually found constitutional. *Wynn v. Scott, supra.*

Second, if the regulation impacts upon the abortion decision, the Court must find as a matter of fact that this "burdens an individual's right to decide to...terminate pregnancy by substantially limiting access to the means of effectuating that decision." *Carey v. Population Services International, supra,* 97 S. Ct. at 2018. Every regulation, however, is not unconstitutional under this test. "The constitutionally protected right of privacy extends to an individual's liberty to make choices, (it) does not, however, auto-

matically invalidate every state regulation in this area." *Carey v. Population Services International, supra,* 97 S. Ct. at 2017. Thus, "a requirement for a lawful abortion" is not unconstitutional unless it *unduly burdens* the right to seek an abortion. *Bellotti v. Baird I, supra,* 96 S. Ct. at 2866. "Even a burdensome regulation (however), may be validated by a sufficient compelling state interest." *Carey v. Population Services International. supra,* 97 S. Ct. at 2017. To determine if the woman's due process rights are violated, therefore, the Court must find as a matter of fact that the regulation *unduly burdens* the abortion decision *and* is not supported by a compelling state interest. If it is not unduly burdensome, the provisions need only be reasonably related to a rational state interest.

Thirdly, whether or not the abortion regulation makes an unconstituional distinction between the abortion decision and other comparable surgical procedures such that it would violate equal protection of the law. However, "not all distinction between abortion and other procedures is forbidden...the constitutionality of such distinction will depend upon its degree and the justification for it." *Maher v. Roe, supra,* 97 S. Ct. at 2382; *Bellotti v. Baird I, supra,* 96 S. Ct. at 2867. Thus, the Supreme Court has upheld several abortion specific regulations as applied to the first trimester. See *Connecticut v. Menillo,* 423 U.S. 9 (1975), upholding the requirement that an abortion must be performed by a physician; *Planned Parenthood v. Danforth, supra,* upholding informed consent, recordkeeping and reporting requirements; and *Bellotti v. Baird I, supra,* suggesting that a form of parental and Court consent before a minor may obtain an abortion was constitutional. Thus, "There are no hard-and-fast rules for determining the limit of the regulation power. The facts in every case are crucial." *Aware Woman Clinic v. City of Cocoa Beach,* No. 77-361-Orl-Civ-Y (M.D. Fla., Memorandum Opinion, April 21, 1978) p. 20. To determine if the woman's equal protection rights are violated, therefore, the Court must find as a matter of fact that the degree of the differing treatment of abortion over other comparable surgical procedures is not justified by the difference between abortion and other comparable surgical procedures and any reasonable state interest.

In analyzing Illinois abortion funding restrictions, the District Court properly found that the right of privacy established in *Roe v.*

Wade, supra, and *Doe v. Bolton, supra,* was not implicated by the funding restrictions. *Zbaraz v. Quern,* 469 F. Supp. 1212, 1218 (N.D. Ill. 1979). This ruling was based upon the subsequent Supreme Court decisions in *Maher v. Roe, supra,* and *Poelker v. Doe,* 432 U.S. 519 (1977). In *Maher,* this Court explained that:

> *Roe* did not declare an unqualified "constitutional right to an abortion", as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. *It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds... Maher v. Roe, supra,* 97 S. Ct. at 2382 (emphasis added).

As a result, the District Court found that no fundamental right was impinged and the government funding restriction was not subject to strict scrutiny.

The *Maher* decision was based in part upon the recognition that there is a fundamental difference between statutes that prohibit a woman from seeking an abortion and statutes that merely treat the subject of abortion and childbirth differently. As explained by the Court:

> An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. *Maher v. Roe, supra,* 97 S. Ct. at 2382.

Thus to require the public to fund private implementation of private rights was found more than semantically absurd: it was logically inconsistent. Abortion is not in itself a constitutionally protected right. The Court in *Roe* had identified abortional freedom as a "negative" or "non-interference" right. Abortion was placed within a "zone" of privacy which the Constitution rendered impenetrable by the state unless its interests were sufficiently compelling. Within this private sphere, decisions reached and effectuated must be free from state interference — the state may not punish, burden, or obstruct inside those boundaries. However, the actors within the protected zone — the woman and her concurring physician — cannot venture forth beyond the parameters to demand public participation in their private decision without regard to the valid public interests at stake. They may not compel either private or public hospitals to provide abortion facilities nor may they compel the public to fund them. The claimants in *Maher* and *Poelker* had sought to force the state into this protected sphere of privacy thereby implicating the state in activities it was, at the same time, forbidden to proscribe or even regulate. This proposition did not tolerate close, reflective judicial analysis.

The fact remains, therefore, that no government is obligated to fund anyone's constitutional rights. Simply because there is a right to travel found in *Shapiro v. Thompson,* 394 U.S. 618 (1969), the states would not be found to have "penalized" that right "by refusing to pay the bus fares of the indigent travelers." *Maher v. Roe, supra,* 97 S. Ct. at 2382. The right of parents to educate their children in private schools and choose curriculum without state interference, *Pierce v. Society of Sisters,* 268 U.S. 510 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923), does not create fundamental rights with reference to equal public funding. See *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 30-31 (1973). Though one possesses the right of privacy to maintain pornographic material in the home, *Stanley v. Georgia,* 394 U.S. 557 (1969), it does not follow that traffic in obscene matter may not be proscribed, *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973), much less that the government must purchase it for indigents simply because inoffensive fare is provided in public libraries.

Similarly, one of the most sacred fundamental rights of the people is to participate in the electoral process. Yet in *Buckley v. Valeo,* 424 U.S. 1 (1976), the Supreme Court ruled that the Federal Election Campaign Act was not unconstitutional because minority party candidates were effectively denied federal funds:

> The Constitution does not require the Government to "finance the efforts of every nascent political group," (case cite omitted) merely because Congress chooses to finance the efforts of the major parties. Furthermore, appellants have made no showing that the election funding plan disadvantages

non-major parties by operating to reduce their strength below that attained without any public financing. *First, such parties are free to raise money from private sources...Buckley v. Valeo, supra,* 424 U.S. at 98-99 (emphasis added).

The final resolution of this semantic thicket requires the separation of the concept of force, hindrance, coercion or punishment that operates in an affirmative manner against personal rights and selective legislative policy which directs funds to be spent in a certain manner. The private rights affirmed in *Roe v. Wade, supra,* logically lose their fundamental character when thrust into the public forum. It would make little sense to interpret the Constitution to require abortion funding in *Maher* unless the Court was prepared to require implementation of a host of other rights far more explicit in the Constitution and essential to the operation of political democracy.

The *Maher* court also implicitly rejected the notion that abortion and childbirth are simply two different ways of coping with pregnancy. As a result, the court rejected the argument that, because a woman's private decision as to which alternative she would choose is constitutionally protected, the state may not influence that decision by subsidizing childbirth but not abortion.

For the purpose of constitutional analysis, abortion is not simply the other side of the coin to childbirth. The fundamental right of a woman to bear her child is unique. It is a constitutional right that stands absolute and unqualified. Regardless of the danger to herself or the circumstances attending her pregnancy, a woman has an absolute right to bear her child. The right of a woman to have an abortion, on the other hand, is not an absolute unqualified right because the state has a valid interest in unborn human life. *Roe v. Wade, supra,* 410 U.S. at 155.

At some point, the state interest in protecting prenatal life becomes dominant and the state may go so far as to proscribe the abortion procedure. *Roe v. Wade, supra,* 410 U.S. at 155. As stated by the court in *Roe v. Wade,* "...The pregnant woman cannot be isolated in her privacy. She carries an embryo, and later, a fetus, if one accepts the medical definitions of the developing

young in the human uterus. (Citation.) The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley, Loving, Skinner,* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly." *Roe v. Wade, supra,* 410 U.S. at 159.

Thus the fundamental difference between the right of a woman to bear her child and the right of a woman to abort her pregnancy is not difficult to pinpoint. Childbirth is the continuation of human life. Its legitimacy requires no explanation. Abortion on the other hand entails the termination of potential human life. To some it is the best, the kindest and the wisest solution to unwanted pregnancy. To others, it is plainly murder.

Thus, combining the right of a woman to bear her child with the right of a woman to have an abortion into a single constitutional right is a logical fallacy. These rights are separate and unique. They are governed by different constitutional principles.

In interpreting *Maher v. Roe, supra,* however, the District Court interprets the decision as only applying to "non-therapeutic" abortions, leaving open the question of whether or not the government may treat an indigent woman in medical need of an abortion differently from an indigent woman in medical need of other surgical procedures. *Zbaraz v. Quern, supra,* 469 F. Supp. at 1218. The District Court relied upon the fact that the Connecticut statute in *Maher* provided funding for "medically necessary" abortions and, thus, *Maher* only applied to "purely elective" abortions. *Zbaraz v. Quern, supra,* 469 F. S. at 1219.

An analysis of the restrictions on abortion funding in *Beal v. Doe,* 432 U.S. 438 (1977), *Maher* and *Poelker* reveals that this Court was not basing its decision to uphold regulations allowing abortions upon "medical necessity." In *Beal,* an abortion,

for which Pennsylvania would provide funding, was defined by regulation as medically necessary when pregnancy could threaten a woman's health, when pregnancy resulted from rape or incest and would constitute a threat to a woman's mental or physical health, and when an infant would possibly be born with an "incapacitating physical deformity or mental deficiency." *Beal v. Doe, supra,* 97 S. Ct. at 2369 n. 3. In *Maher,* the Connecticut regulation provided funding for medically necessary abortions, a term including psychiatric necessity. *Maher v. Roe, supra,* 97 S. Ct. at 2378 n. 2. In both of these cases, the Court referred to abortions funded under the regulations as "therapeutic" and abortions not so funded as "elective."

In *Poelker,* it was argued that the refusal of a city-owned hospital to provide the plaintiff an abortion violated her constitutional rights. The plaintiff was unable to obtain an abortion at the hospital for two reasons. The hospital was staffed by doctors from a nearby Catholic medical school who were opposed to abortion, and a directive from the mayor of the city prohibited abortions at the hospital except in circumstances posing "a threat of grave physiological injury or death to the mother." *Poelker v. Roe, supra,* 97 S. Ct. at 2392. As a result, no abortions whatsoever had been performed in Starkloff Hospital, *Doe v. Poelker,* 515 F 2d 541, 548 (8th Cir. 1975), since the mayor's directive was interpreted as permitting abortions "only if the life of the mother was in danger." *Doe v. Poelker, supra,* 515 F 2d at 543. The plaintiff, who desired an abortion because of personal family and financial problems and because of the fact that she had suffered five prior miscarriages caused by cervical fibroid tumors and polyps, an extremely retroverted uterus, and trichomycosis, was denied an abortion at the hospital. *Doe v. Poelker, supra,* 515 F 2d at 542-43. This court found the case "identical in principle" to *Maher* and referred to those abortions not provided by the city hospital as "non-therapeutic". *Poelker v. Doe, supra,* 97 S. Ct. at 2397.

In reviewing these facts, the District Court in *Doe v. Mundy,* 441 F. Supp. 447 (E.D. Wisc. 1971), observed that "the plaintiffs' assertion that the Court carefully defined 'therapeutic abortion' coextensively with 'medically necessary abortion' does not account

for this nonconforming definition of a non-therapeutic abortion in *Poelker.* Instead of deciding, on remand from the Supreme Court, that the hospital had to provide abortions consistent with 'medical necessity' as defined in *Maher,* the court of appeals for the eighth circuit vacated its own opinions and affirmed the district court decision which had denied the woman relief. *Doe v. Poelker,* 558 F 2d 1346 (8th Cir. 1977)." This fact only underscores the notion that *Beal, Maher,* and *Poelker* did not differentiate between medically necessary and elective abortions. They were simply affirming the right of the state to fund whatever abortions they wished. See also, *D.R. v. Mitchell,* 456 F. Supp. 609 (D.C. Utah 1978); *Woe v. Califano,* 460 F. Supp. 234 (S.D. Ohio 1978); *Freiman v. Walsh,* No. 77-4171-CV-C (W.D. Mo., Memorandum Opinion, Jan. 26, 1979); *Committee To Defend Reproductive Rights v. Myers,* No. 1 Civil 45066 (Calif. App., Memorandum Opinion, May 29, 1979).

Also of note is the opinion of the Secretary of Health, Education and Welfare on whether or not states must fund medically necessary abortions. In an *amicus brief* filed in *Freiman v. Walsh, supra,* on August 26, 1977, the Secretary stated that:

> ...The issue before this Court is whether the state can constitutionally determine that it will not provide funds for abortions except where "a full-term pregnancy would cause a cessation of the mother's life."The Supreme Court's decision in the case of *Maher v. Roe,* 432 U.S. _____, 45 U.S.L.W. 4787 (June 21, 1977), suggests that the answer must be in the affirmative.

This opinion is particularly persuasive since the Secretary is charged with the administration of the Medicaid program. As the Supreme Court observed in *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corporation,* 360 U.S. 411, 420 (1959), to hold that an issue is:

> ...ultimately for judicial rather than administrative resolution...does not mean that the courts must therefore deny themselves the enlightenment which may be had from a consideration of the relevant...facts which the administrative agency charged with regulation of the transaction...is peculiarly well equipped to marshal and initially to evaluate...

See also *Far East Conference v. United States of America,* 342 U.S. 570, 574-575 (1952); *Rosada v. Wyman,* 397 U.S. 407 (1970); and *Mathews v. Eldridge,* 424 U.S. 319 (1976). As a result, the Secretary's opinion should be given special weight. It is important to note that this Court declared *no limitation* by *Roe* upon a state that wishes to fund childbirth over abortion. There is no language qualifying "abortion". There is no hairsplitting concerning therapeutic abortions. Most important is the court's rationale concerning indigent women. This rationale rejects the concept that indigency automatically begs a deprivation of constitutional rights. An indigent woman "continues...to be dependent on private sources." *Maher v. Roe, supra,* 97 S. Ct. at 2382-2382. What is the difference then between an indigent woman who wants an elective abortion and one whom a doctor claims would need a "therapeutic" abortion? Will not the "private source" be available also for the woman who needs a "therapeutic" abortion?

(2) EQUAL PROTECTION IN ABORTION FUNDING

In analyzing the constitutionality of the limitations on government abortion funding established by Congress and the State of Illinois, the District Court applied the equal protection analysis. *Zbaraz v. Quern, supra,* 469 F. S. at 1216. Correctly, the District Court determined that no suspect class was involved and the laws did not impinge upon a fundamental right, therefore requiring only a rational state interest to support the enactments. In so doing, however, the court mistakenly assumed that the restrictions herein must pass muster under the equal protection clause. In refusing to fund some abortions, the District Court reasoned that the statutes treated different classes of individuals differently, i.e. indigent women in medical need of abortions and indigent women in medical need of other surgical procedures. In fact, these statutes do not classify *persons* as such; they classify *services* demanded by those persons. See *Geduldig v. Aiello,* 417 U.S. 484, 494-98 (1974). Since the Constitution requires equal protection of persons, but not services, and anyone can choose the assisted or unassisted services, the equal protection analysis does not apply and only a rational basis is necessary to find the legislation constitutional. This analysis insures that the laws are not wholly arbitrary or capricious. See *San Antonio School District v. Rodriguez, supra,* 411 U.S. at 59-61.

(3) THE RATIONAL INTERESTS SERVED BY THE ABORTION FUNDING RESTRICTIONS

The Supreme Court has recognized at least five state interests sufficient to justify regulation of the abortion procedure. These interests are "in safeguarding health, in maintaining medical standards...(,) in protecting potential life," *Carey v. Population Services International, supra,* 97 S. Ct. at 2017, "in favoring childbirth over abortion," *Maher v. Roe, supra,* 97 S. Ct. at 2382, and in insuring that the abortion decision is made "with full knowledge of its nature and consequences." *Planned Parenthood v. Danforth, supra,* 428 U.S. at 66. In addition, there are other interests that may be served in the instant case since regulation of the abortion decision is not involved. The following are four separate interests served by these acts which provide a rational basis for their enactment.

(a) Childbirth

The Supreme Court has found that the State has a legitimate interest in potential life. This interest which "grows in substantiality as the woman approaches term and, at a point during pregnancy...becomes compelling," *Roe v. Wade, supra,* 410 U.S. at 163, is based upon the fact that the unborn child is an independent human being. Liley, "The Fetus as a Personality" 6 Aust. N.Z.J. Psych 99 (1972); Tiefel, "The Unborn", 239 JAMA 2263 (1978).

The humanity of the unborn has been widely recognized. Medical textbooks have treated the combination of the sperm and egg as the definite beginning of a new individual. Arey, L., *Developmental Anatomy,* W.B. Saunders Corp., 7th Ed. (1974), p. 55; Patten, B., *Human Embryology,* McGraw-Hill Book Company, 3rd Ed. (1968), p. 41; Gilbert, M., *Biography of the Unborn,* The Williams and Williams Company (1938), p. 2. Even those who advocate abortion on demand and have participated in thousands of abortions recognize the fact that the content of the pregnant uterus is a human life. Editorial, "A New Ethic for Medicine and Society," 113 Calif. Med. 67 (1970); Nathanson, "Deeper into Abortion," 291 New England Journal of Medicine 1189 (1974). With a pregnant woman, "two people are involved, the mother and

her child." Liley, H.M.I., *Modern Motherhood,* Random House, Rev. Ed. (1969), p. 207.

Because of this potential life, the state has a "strong and legitimate interest in encouraging normal childbirth." *Beal v. Doe, supra,* 97 S. Ct. at 2372. This interest is sufficient to justify the state's refusal to fund abortion, *Maher v. Roe, supra,* 97 S. Ct. at 2385, and refusal to permit abortion in public hospitals. *Poelker v. Doe, supra.* This interest is sufficient to support state regulations which do not interfere with the woman's right by leaving her in the same position as she would be without them. *Wynn v. Scott, supra,* 449 F. S. at 1308.

(b) Maternal Health

The Supreme Court has also recognized the interest of the state in maternal health as justifying regulation of the abortion procedure. This interest also increases as the term of the pregnancy increases and becomes compelling at the end of the first trimester. *Roe v. Wade, supra,* 410 U.S. at 163. During the first trimester, however, the state still has an interest in health that can support non-burdensome regulations. *Wynn v. Scott, supra.* As a result, the U.S. Supreme Court has upheld the requirement that a physician perform the abortion, *Connecticut v. Menillo, supra,* and that the physican keep records and make reports, *Planned Parenthood v. Danforth, supra,* as reasonable regulations supported by the state interest in maternal health. After the first trimester, the state's interest in maternal health is sufficient to support requirements as to the qualifications of the person who is to perform the abortion and as to the facility in which the procedure is to be performed. *Roe v. Wade, supra,* 410 U.S. at 163. The state's interest in maternal health, regardless of the degree, continues through the whole pregnancy.

The District Court, however, concluded that the state's interest in maternal health was not advanced by the funding restriction since most health problems associated with pregnancy which would justify an abortion are not life-threatening, therefore, not funded. As a result, the District Court claimed that there would be

a substantial increase in maternal morbidity and mortality among indigent pregnant women. *Zbaraz v. Quern, supra,* 469 F. Supp. at 1220.

The evidence does not support the District Court's dire prediction. The Center for Disease Control established a hospital surveillance project to determine the increased mortality and morbidity among Medicaid recipients from abortion-related complications. After reviewing data from the 13 states and the District of Columbia between October 10, 1977 and June 10, 1978, the CDC determined that there was *no increase in mortality or morbidity among Medicaid recipients as a result of funding restrictions.* Center for Disease Control, "Health Effects of Restricting Federal Funds for Abortion in the United States," 28 Morbidity and Mortality Weekly Report 37 (1979). The funding restrictions have not had an adverse health impact on Medicaid recipients.

In addition, the District Court did not consider many of the factors relating to maternal health which are relevant to a consideration of the health impact of abortion in comparison with childbirth. First, one abortion is not equivalent to one birth. Dr. Christopher Tietze, a noted pro-abortionist, for instance, estimates that two abortions are needed to avert one birth. Hearing before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, Ninety-third Congress, second session on SJ 119 & SJ 130, *Abortion — Part 2,* p. 52; U.S. Government Printing Office, 1976. This figure is probably conservative. Hardy, "Privacy and Public Funding", 18 Ariz. L.R. 903, 924 (1977). The maternal risk of death is 14.9 per 100,000 and the average abortion risk of death is 3.3 per 100,000. Cates et al, "Standardized Mortality Data Associated with Legal Abortion: United States, 1972-1975", 10 Family Planning Perspective 109 (1978). If the mortality risk to a woman for a full term pregnancy is compared with two or three abortions, they approach equivalency.

The District Court's analysis also does not consider the non-fatal complications of abortion which also are a consideraton in maternal health. As delineated in *Privacy and Public Funding, supra,* at pages 929-930, the long term complication rates from

blood loss, infection, incomplete abortion, spontaneous abortion and premature delivery, and tubal pregnancy are high. Most disconcerning are the statistics which reveal the high incidence of fetal loss in subsequent pregnancies, Richardson & Dixon, "Effects of Legal Termination on Subsequent Pregnancy", 32 Obstetrics & Gynecology Survey 21 (1977), and sterility. Trichopoulos, et al., "Induced Abortion and Secondary Infertility," 83 British Journal of Obstetrics & Gynecology 645 (1976).

The latest statistics on abortion complications reveal the devastating long-term impact of abortions on the health of the mother and her infant in subsequent pregnancies. In the most comprehensive analysis to date, the National Institute of Child Health and Human Development of the Department of Health, Education and Welfare compared the rate of adverse pregnancy outcomes among more than 20,000 women with a prior record of induced abortion with a matched number of women with no prior recorded induced abortion. Appendix, p. 1. The preliminary results were startling. The women with prior induced abortions suffered:

(1) 85% higher incidence of spontaneous fetal deaths,

(2) 32% higher incidence of low birth weight infants (often associated with birth defects),

(3) 67% higher incidence of early gestational infants (also often associated with birth defects),

(4) 47% higher incidence of labor complications, and

(5) 83% higher incidence of delivery complications.

The conclusion is inescapable. In addition to the immediate complications most often reported, the long term detrimental health impact of abortion is often devastating. Such factors must be considered in analyzing maternal health. Considered in toto, therefore, a reasonable basis exists for the legislature to restrict abortion for the purpose of maternal health.

(c) Fiscal Frugality

With the passage of Proposition 13 in California, the importance of the government's fiscal interest in allocating scarce state funds is brought into even clearer focus. The District Court, however, found that this interest was not served since the cost of an abortion is less than the cost of childbirth. Here again, the District Court failed to take into consideration numerous other factors which demonstrate the favorable fiscal impact of these restrictions.

1. The Fiscal Interest Cannot Be Narrowed to a Simple Comparison of the Relative Costs of Abortion and Birth

The District Court has adopted a strange view of the ability of a state to consider its own fiscal interests. In maintaining there can be no state fiscal interest in curtailing "medically necessary" abortions because the costs of birth and welfare are greater than those of abortion, they seemingly say at one and the same time that the state cannot look merely at the cost of the abortion, because that is too short-term, but neither can it look beyond the costs of birth and early dependency, because that is too long-term. They exclude the long-term fiscal benefits of a child's life to the state, focusing only on the fiscal burdens.

Not just the children of the poor, but all children, are dependent and consume, rather than produce, resources. If both the state and the individual parents, who make up the society of citizens which the state represents, were to consider only the fiscal elements related to the first years of life, all children would be aborted. Of course, if a society or parents were to restrict their thinking to purely fiscal considerations, this thinking would not be restricted to such short-term reasoning. They recognize that the child who needs support and care now will in all probability eventually pay back these costs to society — with considerable interest.

In the allocation of its funds, any governmental body is constantly faced with balancing short-term benefits and costs against long-term benefits and costs. Given limited resources, difficult choices must be made. For example, health care money

must be allocated between medical research, which may hold out the promise of evental cures and future savings from a consequent drop in expense of care, on the one hand, and financial assistance to help with the medical costs of those who need treatment now, on the other. Similarly, any local community constantly must choose where to build its roads, and when to repave, repair, or neglect them. If the District Court's view were to prevail, it could be maintained that a town which failed to construct a new road was behaving irrationally because in the medium term the construction of such a road would, in the view of some court, later save more money. At the same time a town which chose to build, say, an arterial highway, so as to anticipate the needs of the next two or three decades, in preference to building a more ordinary road which would fulfill the needs of traffic for the next few years, would have to be said to be acting irrationally since it was planning for the long — instead of the middle — term.

The decisions of this nature are to be made by the democratic process. The impropriety of judical interjection into this area of delicate balances should be evident. Inherent in the complexity of the balancing of present and future fiscal interests is the fact that there are a wide variety of alternative courses which would be reasonable for the legislators to adopt. The limitation of funding for abortion certainly falls within that broad spectrum of reasonability.

Our system of government is based upon a sharing of power among three branches. It is the repsonsibility and prerogative of the legislature to weigh their "wisdom or social desirability" for as the Supreme Court held in *Maher v. Roe, supra,* 432 U.S. at 479-480, the judiciary "does not strike down state laws 'because they may be unwise, improvident, or out of harmony with a particular school of thought.' *Williamson v. Lee Optical Co.,* 348 U.S. 483, 488 (1955), quoted in *Dandrige v. Williams, supra,* at 484...We should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.' *Missouri K. & T. R. Co. v. May,* 194 U.S. 267, 270 (1904) (Holmes, J)."

2. It Is Reasonable for the State to Conclude That Abortion is Less Expensive Than Childbirth and Thus to Choose to Limit Abortion Funding as a Means of Conserving Its Fiscal Resources

The legislature has the discretion to conclude that, even on the short-sighted level of comparison to which the District Court insists the state is restricted, the analysis which suggests that abortion is less costly than birth is simplistic. In the detailed and documented study, *Privacy and Public Funding, supra,* substantial evidence is presented that the availability of free abortion tends to decrease contraceptive use and increase pregnancies to the point at which two or three abortions are necessary to avert one birth. When aborton is used as a method of birth control, the one-to-one comparison of abortions to births as alternative pregnancy outcomes simply does not hold. Hardy shows that this may well mean that though the cost of any given abortion is less than the cost of any given birth, when it is multiplied by a factor which takes this greater frequency into account, the cost to the state of funding abortions may well exceed that of funding any births induced by the unavailability of Medicaid reimbursement for abortions. Furthermore, he summarized mounting evidence that abortion complications, both currently reported and projected, may lead to Medicaid costs greatly in excess of those associated with pregnancy complications. Finally, he demonstrates that the administrative burden imposed on health care facilities by the easy availability of free abortion is great. A reading of Hardy's section on these points, *Privacy and Public Funding, supra,* at 925-933, discloses that the state cannot be held to be unreasonable in its conclusion that its fiscal interest is served by refusing to fund abortions not necessary to preserve maternal life.

(d) Neutrality on Abortion

By refusing to pay for most abortions, the state has removed itself from involvement in the abortion controversy. Such neutrality is appropriate since there are wide differences of opinion regarding the morality of this procedure.

A similar approach was taken by the U.S. Congress in prohibiting courts from compelling hospitals to perform any sterilization

procedure which would violate the hospitals' religious or moral belief. 42 U.S.C. §300a 7(a). This Act was upheld on the basis that it preserved "government neutrality in the face of religous differences." *Chrisman v. Sisters of St. Joseph,* 506 F 2d 308, 311 (9th Cir. 1974).

It is one thing for the taxpayer to recognize a woman's right to an abortion; it is quite another for the taxpayer to be compelled to contribute financially to her exercise of that right. It is well established that the state may restrict the use of public funds for purposes that might indicate a lack of tolerance for the beliefs of many of its taxpayers, see *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 723-24 (1961); *Falkenstein v. Department of Revenue,* 350 F. Supp. 887, 889 (D. Ore. 1972), *appeal dismissed,* 409 U.S. 1099 (1973); see also *Reitman v. Mulkey,* 387 U.S. 369, 379 (1967); even if it could not restrict those activities were they privately supported. *Williams v. Eaton,* 468 F 2d 1079, 1084 (10th Cir. 1972). As carefully delineated in *Privacy and Public Funding, supra,* pages 933-938, a substantial number of persons find the state's policy of funding abortion to be strongly repugnant. In the light of the conflicting class of opposing groups and the availability of private resources, it is rational for the government to take a path of neutrality in the abortion funding decision.

(4) BALANCING OF INTERESTS

In spite of a recognition that the government has a legitimate interest in childbirth, the District Court held that, because of the state's interest in maternal health, the state could not restrict government funding for "medically necessary" abortions until viability. *Zbaraz v. Quern, supra,* 469 F. Supp. at 1221. The interest in maternal health was deemed superior and excluded all other, otherwise legitimate, interests.

The District Court misapplied the rational basis test. Instead of determining that a recognized government interest, i.e., childbirth, provided a rational basis for the restriction and upholding the act, the District Court sought to weigh against it any other valid govern-

ment interest to determine which was pre-eminent. Upon finding that maternal health was the most important interest the state might advance, the District Court prohibited the government from advancing its other legitimate interests and mandated government funding of abortions. Such a balancing of interests is not a function of the court. This court had held that, consistent with the Equal Protection clause, a state "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislators' minds...the legislators may select one phase of one field and apply a remedy there, neglecting the others...", *Williamson v. Lee Optical Co., supra; Jefferson v. Hackney,* 406 U.S. 535 (1972). "The Equal Protection clause does not require that a state must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams,* 397 U.S. 471 (1970).

The Equal Protection clause, therefore, does not require a state to pay for abortions for indigent women because of its interest in maternal health. Indeed, this court has held that the Equal Protection clause does not require a state to pay for *any* pregnancy related cost while it pays for most other medical risks. In *Geduldig v. Aiello, supra,* this Court upheld a California disability insurance system for private employees disabled from work by an injury or illness who were not covered by Workmens' Compensation despite the fact that the plan paid for *no* expenses related to a normal pregnancy. This funding restriction was found to comply with the equal protection clause because it was supported by the state's legitimate interests in maintaining the self-supporting nature of the program, in distributing available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered rather than to cover all disabilities inadequately, and in maintaining contribution rates at a level that will not burden participating employees. *Geduldig v. Aiello, supra,* 417 U.S. at 496. This restriction was upheld despite the fact that *the State's interest in fiscal frugality was advanced at the cost of maternal health.* This court simply held that since the restriction was supported by a rational state interest, it would be upheld.

The ramifications of the District Court's analysis are broad. If the state's interest in maternal health is predominant, wouldn't

government funding for abortions after the first trimester (where childbirth is undisputedly safer for the mother than abortion) be unconstitutional? If the state's interest in maternal health and childbirth must be weighed, wouldn't abortion funding after viability be unconstitutional because of the state's compelling interest in childbirth? If the state chose to fund abortions but not childbirth because of overpopulation, wouldn't such funding be unconstitutional after the first trimester because of the state's interest in maternal health and after viability because of the state's interest in childbirth? The balancing and weighing of interests is simply inappropriate and not required. As long as the state's action is taken to advance some rational state interest, it is constitutional.

(5) THE EFFECT OF THE DISTRICT COURT RULING

In actuality, there are few abortions which are needed for medical reasons. Between February 14, 1978 and September 30, 1979, the Health Care Financing Administration, which supervises reimbursement of states for Medicaid abortions, reported only 650 abortions performed because the pregnancy threatened severe and long lasting damage to the health of the woman and only 3,507 abortions performed because of life-threatening conditions. Appendix, p. 8. Assuming that the abortion rate for 1976 continued through September of 1979, more than 1,625,000 abortions were performed during that time. Center for Disease Control, *Abortion Surveillance 1976,* 16 (HEW Publication No. (CDC) 78-8205, 1978). Of the women seeking abortions, only 4.5% of those seeking a second trimester abortion and 10.00% of those seeking a first trimester abortion claim any medical indications. Most seek abortions for social and economic reasons. Appendix, p. 8.

Despite the fact that few women have any true medical reasons for abortion, those who perform abortions are willing to find medical indications simply because the pregnancy is early or the patient wants one.[3] Such testimony belies the District Court's

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3. See *Zbaraz v. Quern,* No. 77C4522 (ND Ill, Memorandum Opinion, June 13, (continued)

"encouragement" that physicians would deem as low as one-fifth of the abortions they perform as medically necessary. *Zbaraz v. Quern, supra,* 469 F. Supp. at 1221.

This situation is exacerbated by the fact that it is usually not a physician who is sought out for advice when pregnancy is suspected. Indeed, in one survey, less than 18% sought the advice of any physician when deciding whether or not to have an abortion and over 87% reported that the physican had absolutely no influence on their decision. Rosen, "The Patient's View of the Role of the Primary Care Physician in Abortion", 67 American Journal of Public Health 863 (1977). Part of the reason for the low influence rate of physicians is the fact that in abortion clinics the physician does not even see the patient until she is on the operating table, prepared for the abortion. Hausknecht, "Free Standing Abortion Clinics: A New Phenomenon", 49 Bull. N.Y. Academy of Medicine 985 (1973). The physican does not even diagnose the women's condition before the procedure.

1978) where the court, in recognizing the problem presented by allowing the physician to define medical necessity, recognized that Dr. Zbaraz felt that all first trimester and most second trimester abortions were medically necessary since, during that time, abortion was medically safer than childbirth. Also see testimony of Dr. Hodgson in *McRae v. Califano,* No. 76-C-1804 (ED NY, Transcript, August 3, 1977, at pp. 99-101):

> In my medical judgment every (pregnancy) that is not wanted by the patient, I feel there is a medical indication to abort a pregnancy where it is not wanted.
>
> In good faith, I would recommend on a medical basis, you understand, that, and it would be 100%...I think they are all medically necessary...
>
> Occasionally we will advise these women to carry their pregnancy to term, but most of these are medically necessary because I am considering the women's physical, mental, emotional and social and welfare and family and environment and all that...I am concerned with the quality of life not physical existence...If the words medically necessary came in I think I could live with it. If I could interpret it in my own way, however.
>
> Q. It would be a good faith interpretation?
>
> A. I could live with it.

The definition of therapeutic is as varied as the commentators upon it. Therepeutic has been defined to include only those necessary to preserve the life of the mother, *Webster's Third New International Dictionary* 2372 (1971), *Beal v. Doe, supra,* 97 S. Ct. at 2372 n. 12; *Doe v. Mundy, supra; D.R. v. Mitchell, supra; Woe v. Califano, supra;* NOTE, "Indigent Women — What Right to Abortion?", 23 N.Y. L.S.L.R. 709 (1978); those necessary to preserve the woman's life and health, *Doe v. Rose,* 497 F 2d 1112 (10th Cir. 1974); those necessary to preserve the woman's health as defined in *Doe v. Bolton, supra,* 410 U.S. at 192, *Smith v. Ginsberg,* No. 75-0380 CH (S.D. W.V., Memorandum Opinion, May 9, 1978); and those that are medically necessary. *Roe v. Casey,* 464 F. Supp. 487 (E.D. Penn. 1978); Susman, "*Roe v. Wade* and *Doe v. Bolton* Revisited in 1976 and 1977", 22 St. Louis U.L.J. 589 (1979). The three lower court decisions in this case adopted the medically necessary definition of therapeutic.

The result of the District Court's decision is to blur beyond comprehension the distinction created in *Maher* between elective and therapeutic abortions. If the court left it up to Dr. Zbaraz and Dr. Hodgson to determine which abortions shall be funded, all would be. This situation reinforces the wisdom of leaving it to the legislature to determine which, if any, abortions shall be funded. It is up to the legislature to decide whether no medical expenses incidental to pregnancy will be funded, as upheld in *Geduldig v. Aiello, supra,* some expenses but not others, *Williamson v. Lee Optical Co., supra,* only a percentage of all expenses, *Jefferson v. Hackney, supra,* or a ceiling on total expenses covered. *Dandridge v. Williams, supra.* "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Jefferson v. Hackney, supra,* 406 U.S. at 546. If the state may exclude payment altogether for normal pregnancy, even though such a condition often requires medical care and may involve a genuine risk to life, *Geduldig v. Aiello, supra,* 417 U.S. at 500 (Brennan, J., dissenting), while paying for treatment for other health threatening conditions, then the government may limit abortion funding to those threatening the woman's life.

II

The Illinois Limitation on Abortion Funding Under Medicaid Does Not Violate Title XIX of the Social Security Act.

The Plaintiff below argued that the Illinois limitation on abortion funding under Medicaid violates Title XIX of the Social Security Act by not funding all medically necessary abortions. In addition, the Seventh Circuit Court of Appeals below found that Title XIX of the Social Security Act required a participating state to fund all medically necessary abortions but only ordered Illinois to fund abortions which were reimbursable under the Hyde Amendment on the grounds that it was a substantive amendment to the Social Security Act. Title XIX of the Social Security Act does not support this interpretation.

(1) THE MEDICAID SYSTEM

The purpose of the Medicaid program, Title XIX of the Social Security Act, 42 USC §1396 *et seq.* (1970), is not one of guaranteeing to the citizens of the State the right to medical treatment for any particular items, but rather, to quote from the Preamble, 42 USC §1396, "of *enabling* each state, as far as practicable under the conditions of each state, to furnish...medical assistance" (emphasis added).

A State, which opts to participate in the Medicaid reimbursement scheme, is required to pay "part or all" of the costs for services in five general categories set forth in 42 USC§1396d(a). The States plan for providing reimbursement for the services is required by 42 USC §1396a(a)(17) to "include reasonable standards ...for determining...the extent of medical assistance under the plan which...are consistent with the objectives of this (Title)." In so doing, each State is authorized to

> Specify the amount and/or duration of each item of medical and remedial care and services that will be provided...Such items must be sufficient in amount, duration, and scope to reasonably achieve their purpose...(T)he state may not arbitrarily

deny or reduce the amount, duration or scope of such services to an otherwise eligible individual solely because of the diagnosis, type of illness, or condition. Appropriate limitations may be placed on services based on such criteria as medical necessity or those containing utilization or medical review procedures. 45 CFR §449.10(a)(5)(i).

Each State, therefore, has wide authority in specifying the extent of the medical assistance it will provide under the Medicaid plan with the limitation that if "a given item of medical assistance is made available in a particular amount, duration, and scope to any individual or individuals, it must be made equally available to all other individuals similarly situated in terms of eligibility and need." 42 USC §1396a(a)(10). What items of assistance "that will be provided" are left up to the State. "Nothing in the statute suggests that participating states are required to fund every medical procedure that falls within the delineated categories of medical care." *Beal v. Doe, supra,* 432 U.S. at 444.

The lower courts found, however, that this regulation requires the State to use medical necessity as a criteria. This regulation, however, in emphasizing that the State may establish "appropriate limits," says that limitations may be based on criteria "such as" medical necessity and review procedures, without excluding other criteria of which these are only examples. The language "such as" renders inapplicable the maxim *inclusio unius est exclusio alterius.* As a result, "the regulating provision indicates that the 'medical necessity' criterion is merely illustrative of the types of criteria that may be employed to limit services, and nothing in the provision suggests a more restrictive criterion is prohibited." *D.R. v. Mitchell, supra,* 456 F. Supp. at 625.

In addition, the regulation requires that "the state may not arbitrarily deny or reduce the...scope of...services...solely because of the diagnosis, type of illness, or condition." The State of Illinois' choice not to fund certain abortions is not based upon "the diagnosis, type of illness or condition" *at all.* The condition of pregnancy, and any illnesses associated with pregnancy which may be diagnosed, are covered by Medicaid. Illinois is merely refusing to fund one alternative response to pregnancy.

As expressed by the district court in *D.R. v. Mitchell, supra,* 456 F. Supp. at 617-618, therefore:

> These statutory and regulatory provisions lead inescapably to two basic conclusions. First, the participating state may select those procedures which it will fund under the Medicaid program and may determine the extent to which those procedures will be funded, placing "appropriate limits" on the services offered. Second, the discretion of the participating state is limited only by three factors: (1) the plan or standard adopted by a state must be reasonable; (2) Medicaid funds must be distributed equally and equitably among Medicaid recipients; and (3) the plan or standard must be consistent with the objectives of Title XIX.

The issue before the Court, therefore, is whether or not the restrictions placed on abortion funding by the Illinois legislature are reasonable, equitable and consistent with the objectives of the Medicaid Act.

(2) BROAD DISCRETION IN STATES TO DETERMINE FUNDING

The broad discretion afforded States in determining the "appropriate limitations" on the services offered is illustrated by several recent cases. In *Quern v. Manley,* 98 S. Ct. 2068 (1978), for instance, the U.S. Supreme Court dealt with a similar proposal of "cooperative federalism." There, Title IV-A of the Social Security Act had broad language authorizing wide eligibility for the emergency assistance program. The State of Illinois had implemented an emergency assistance program in which the eligibility requirements were defined significantly more narrowly than in the federal act. The court held that these limitations were within the reasonable discretion of the state.

The opinion contrasted the emergency assistance program with that for Aid to Families with Dependent Children (AFDC), noting that they had parallel statutory provisions which, in describing eligible persons, were "in terms of definition of the program for which federal funding is available", *Quern v. Manley, supra,* 98 S.

Ct. at 2079, but that while the AFDC reference to "dependent child" was later defined specifically in the statute, the emergency assistance term "needy child" was not later defined. Thus, the Court, held, Congress intended the AFDC language, but not the emergency assistance language, to be binding in its breadth upon the state. *Quern v. Manley, supra,* 98 S. Ct. at 2079. The parallel to 42 USC §1396 is remarkable. Here in describing eligible persons, the section defines the program for which federal funding is available. Like the emergency program, and unlike AFDC, the key term on which the plaintiffs rely is not later defined in the statute. "(N)ecessary medical services," like "needy child," is not "statutory language...that can reasonably be understood as imposing uniform standards...on every state program." *Quern v. Manley, supra,* 98 S. Ct. at 2079. Similarly, the language "as far as practicable under the conditions in that state," on which the Plaintiffs rely to establish broad state discretion is almost identical to the language in §1396.

The Court observed that "the very breadth of the potential reach of E.A. (Emergency Assistance) — to virtually any family with needy children of a certain age that faces a risk of destitution — argues against the inference that Congress intended to require participating states to extend aid to all who were potentially eligible under §406(e). A literal application of all of the §406(e) standards ...would create an entirely open ended program, not susceptible of meaningful fiscal or programatic control by the states." *Quern v. Manley, supra,* 98 S. Ct. at 2080. Precisely the same could be said of the standard, suggested by the lower courts, that all "necessary medical services" must be funded, without limitation by the state, upon physician demand.

In *District of Columbia Podiatry Society v. District of Columbia,* 407 F. Supp. 1259 (D.D.C. 1975), the District of Columbia had limited podiatry services available under the Medicaid program. The court, in a decision squarely on point, ruled against the plaintiffs' claim that all services claimed by any physican to be "medically necessary" need not be funded. The court emphasized that Congress intended to give the states considerable flexibility in deciding what items of medical assistance to provide. *District of*

Columbia Podiatry Society, supra, 407 F. Supp. at 1264.

In *Virginia Hospital Association v. Kenley,* 427 F. Supp. 781 (E.D. Va. 1977), the court upheld the state's imposition of durational limits on institutional care which limited reimbursable hospital stays to 21 days annually. The court ruled that these limits did not violate the comparability requirements of 42 USC §1396a(a)(10) or the best interest of recipients requirement of 42 USC §1396 (a)(19). It held that the limits were justifiable under the broad discretion states are given to allocate available resources "as far as practicable" by 42 USC §1396. It did so even though it found that for some recipients hospital stays for periods in excess of 21 days were "medically necessary," *Virginia Hospital Association, v. Kenley, supra,* 427 F. Supp. at 785, because it noted that under what is now 45 C.F.R. §449 10(a)(5)(i), a state may set reasonable standards defining the extent of medical service provided. The Court repeatedly stressed that the requirements of 42 USC §1396a apply only to services provided by the state plan — a qualification explicitly written into the statute. Thus, the requirements "do not define what the extent of the original coverage must be," *Virginia Hospital Association v. Kenley, supra,* 427 F. Supp. at 783. If this is true when a state plan provides for coverage of hospital stays, but limits them to 21 days, *a fortiori* it is true when, as here, the state does not seek to limit the duration of a service it provides, but rather implements a state plan which funds some abortions but not others.

Most appropriately, in *Beal v. Doe, supra,* the issue was whether Title XIX of the Social Security Act, under which participating states financially assist qualified individuals with regard to medical treatment, requires participating states to fund the costs of "nontherapeutic" abortions. The Supreme Court held that Title XIX does not require participating states to fund every medical procedure, but that each state is given broad discretion to determine how much medical assistance is reasonable and consistent with Title XIX; that it is not inconsistent with Title XIX to refuse to fund unnecesary, although perhaps desirable, medical services; that the Court would not presume that Congress intended to condition state participation in Medicaid upon the state's willingness to compromise its strong interest to encouraging normal

childbirth; and, given the fact that abortions were unlawful in most states at the time Congress passed Title XIX, it is not consistent to suppose that Congress intended to require, as opposed to permit, participating states to fund nontherapeutic abortions.

(3) STATES NEED NOT FUND "MEDICALLY NECESSARY" ABORTIONS

In spite of this authority, the lower courts found that a state must fund all medically necessary abortions. To do so would authorize the attending physician to determine when an abortion, performed on an indigent woman, is to be publicly funded. The resultant potential for abuse is extreme, considering that the attending physician's economic interest and the patient's self-conceived personal interest are in diametric opposition to the state's democratically determined interest in fetal life.

"Medically necessary" is a vague and amorphous term capable of extremely broad interpretation. Indeed, it has been the calculated effort of those displeased by the Supreme Court's decisions in *Beal* and *Maher* to obtain the same end heretofore denied them through the device of abusing physicians' discretion to label elective abortion "medically necessary." The dangers to the state's fiscal interests as well as to its interest in the unborn inherent in the vague notion of "medical necessity" is obvious. (See Section I)(5), *The Effect of the District Court Ruling.*

Here, the possible circumstances in which, under some interpretation, an abortion might be called "medically necessary" range from situations in which maternal death will occur within minutes without surgery (as when a tubal pregnancy ruptures) to a case in which Dr. Hodgson hears a woman who desires to abort her pregnancy. In exercising its authority to formulate limitations based upon the degree of medical necessity, the state balances its interests in maternal health and in not financing elective abortions to come up with language which protects both interests while, as with all legislative compromises dealing with potentially competing

interests, necessarily entailing the partial curtailment of the complete fulfillment of either interest in order not to sacrifice all of the other interest.

Only by drawing some clear line in the vast grey area of "medical necessity," as the state of Illinois had done, can it avoid funding elective abortions and thereby protect its interests in unborn human life. As Judge Anderson observed, a standard of "medical necessity" determined purely by the physician would mean that "a 'therepeutic' abortion must include any lawful abortion that would make the pregnant woman feel better." *D.R. v. Mitchell, supra,* 456 F. Supp. at 623. In enjoining the enforcement of the Illinois statute, the District Court gave lip service to the state's theoretical right to exclude elective abortion from its funding, but in practice would deprive the state of the only available means it has of exercising this right. In the light of such expressions, surely the state may reasonably take precautionary measures to limit abortion funding.

(4) THE PASSAGE OF THE HYDE AMENDMENT FURTHER BUTTRESSES THE CONTENTION THAT TITLE XIX OF THE SOCIAL SECURITY ACT DOES NOT MANDATE THE FUNDING OF "MEDICALLY NECESSARY" ABORTIONS

It makes little sense to concede, on the one hand, that Congress was concerned enough about the use of taxpayer monies to pay for abortions that it passed the restrictive Hyde Amendment, and, on the other hand, to argue that Title XIX, also a product of Congress, mandates full state payment for the whole range of abortions. In other words, had Congress felt at the time the Hyde Amendment was enacted that Title XIX already mandated what Hyde intended to restrict, they would have amended Title XIX.

There are two reasons why Congress chose an appropriations amendment to limit federal participation in abortion funding. First, as already pointed out above, Title XIX was never intended to mandate across the board the services for which states must pay. Only the broad categories were outlined. Title XIX is primarily concerned with the groups of eligible persons for medical assistance

and, to that end, *appropriations* of the federal funds were made for reimbursement to the states according to their designated plans. Rather than destroy the concept of "cooperative federalism" by directly amending Title XIX, Congress chose the method of *dis*-appropriating federal funds for most abortions. The various states, therefore, were free to decide whether to continue funding abortions on their own.

Second, Title XIX was originally enacted in 1965, eight years before the U.S. Supreme Court decisions of *Roe v. Wade, supra,* and *Doe v. Bolton, supra.* At the time of the enactment of Title XIX, 46 of the 50 states (including Illinois) proscribed abortion altogether. Two states permitted abortion for "health" reasons Alabama, Code Title 46 §270 (Supp. 1963), and Oregon, Ore. Rev. Stat. §163.060 (1964); two states permitted abortion when pregnancy presented a grave threat to life or health, Colorado, Colo. Rev. Stat. §40-2-23 (1964), and New Mexico, N.M. Stat. Ann. §40A-5-1-3 (1964). Thus, 48 of the 50 states in 1965 did not even contemplate a definition of permissible abortion as broad and all-encompassing as the lower courts claim Title XIX "mandated." Therefore, any discussion of the legislative intent of Title XIX which does not deal with the historical content in which it was enacted is flawed. This canon of construction is mandatory; "special rules of construction" may not be adopted to escape its application. *Burns v. Alcala,* 420 U.S. 575, 580 (1975).

In *Beal,* the respondents were forced to rely solely upon the fact that abortion was not expressly excluded when Congress amended Title XIX to include "family planning services" within the broad categories of required services, as reason to believe that Congress henceforth intended to require abortion funding. This Court concluded that:

> (t)his line of reasoning is flawed. The failure to exclude abortions from coverage indicates only that Congress intended to *allow* such coverage, not that such coverage is mandatory for nontherapeutic abortions. *Beal v. Doe, supra,* 432 U.S. at 446 n. 10. (Emphasis added.)

The court's conclusion was obvious in view of the fact that the Act

was so amended in 1972, before the decision in *Roe v. Wade,* in 1973 which legalized abortion. But in further support of its conclusion, the court noted that

> (a)t the time of our 1973 decision in *Roe,* some eight years after the enactment of Title XIX, at least 30 states had statutory prohibitions against nontherapeutic abortions. *Beal v. Doe, supra,* 432 U.S. at 447 n. 12.

It is important to recognize that when the Supreme Court in *Beal* used the term "therapeutic" abortions, it was referring to abortions performed to save the life — as opposed to merely the health — of the mother, since of the "30 states" the court indicated proscribed "nontherapeutic" abortion, 28 proscribed abortion altogether or permitted it only to preserve maternal or unborn life. Thus, based upon the Supreme Court's use of the term "therapeutic" in *Beal,* the Illinois legislature provides funding for "therapeutic" abortions and excludes only "nontherapeutic" abortions.

Of course, the Supreme Court's decision in *Roe v. Wade* did not alter the content, terms or intent of the Social Security Act. In fact, if any plaintiff had raised the claims presented here during 1972, the suit would have been dismissed as ludicrously frivolous. The intent of the enacting Congress never changes; it is a historical fact. Judical revisionism of historical congressional intent is neither philosophically nor jurisprudentially justifiable. Therefore, this court's holding about what the Congress intended in 1965 should be no different in 1978 than it would have been in 1972. And, insofar as Congress has since perceived its obligations under this program of "co-operative federalism," it has acted to restrict funds to be allocated to the states under Title XIX in a manner which falls short of funding "medically necessary" abortions — further implying that Congress does not understand the Act to require the states to fund "medically necessary" abortion. Congressional funds for no other medical practice or procedure have been restricted in this manner.

Recent congressional debates have buttressed this interpretation. During the recent debates on congressional funding of abor-

tions, Rep. Henry Hyde, the original author of the Hyde Amendment, was asked by Rep. Bauman about the intent of his amendment:

> Mr. Bauman: Mr. Chairman, I have asked the gentleman to yield only so I can get his comment as the author of the original Hyde amendment language.
>
> As the gentleman knows, I refer to a number of Federal court cases that have been handed down in the last year, particularly one in Ohio, in which the courts interpreted the Hyde language to restrict the right of the States to pass anti-abortion language that is stricter in content than the Federal law.
>
> I will ask the gentleman, was that in fact ever the intention of that language?
>
> Mr. Hyde: Certainly not.
>
> Mr. Bauman: In other words, it was, as I understood it, the intention of the language to permit States to enact legislation consistent with their own wishes, whether more or less restrictive, to govern the funding of abortions?
>
> Mr. Hyde: Absolutely. It seems to me the Federal legislative process ought to control the Federal purse strings, and the State funds ought to be controlled by the State Legislatures.
>
> For the courts to say that, when the Social Security Act was passed or this title was passed, in 1963 or 1965, and since in the preamble the words, "medically necessary," are found at a time when abortions were a crime in most of the States of this country at the time that this basic statute was passed, somehow or other that mandates the States to fund abortions, even though we in the Federal Government have said we will fund no abortions except to save the life of the mother, is ridiculous.
>
> So, Mr. Chairman, this amendment offered by the gentleman from Maryland (Mr. Bauman) clarifies this issue and says we are not imposing on the States any mandate on the issue of abortion. Cong. Rec. H11771 (daily ed. Dec. 11, 1979).

Congress, therefore, interpreted Title XIX to provide no limitations on the state's discretion to limit abortion funding. The intent of passage of the Hyde amendment was to limit federal funding of abortions, not require states to fund them.

III

The Appropriations Clause of the United States Constitution Prohibits the Judiciary from Ordering Payments for Abortions Beyond the Limitations Established by Congress.

The Constitution of the United States grants the exclusive authority to appropriate funds to the Congress via Article I, Section 9, Clause 7:

> No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law...

The power to appropriate or make funds available for payment by the various agencies and departments of our government is not vested in the executive nor in the judical arms of our government. It is therefore not within the realm of the judiciary to make available or to limit any funds. The U.S. District Court for the Southern District of California has made the following statement regarding the separation of these powers:

> The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same. Any attempt by the judicial branch of our government to interfere with the exclusive powers of Congress would be a plain invasion of the powers of said body conferred upon it by the Constitution of the United States.
>
> Our judiciary has been exceedingly careful not to intrude upon the powers of the other two branches of the government

and has often recognized its limitations in this respect.

In the case of *Decatur v. Paulding*, 14 Pet. 497, 39 U.S. 497, 522, 10 L. Ed. 559, the court expressed itself as follows: "...To permit an interference of the courts of justice with the accounts and affairs of the treasury, would soon sap its very foundations; money would not be drawn out according to its own rules, nor could the secretary of the treasury ever inform congress of the amount needed. Congress would, of necessity, be compelled to consult the court, not the secretary, when making appropriations." *Spaulding v. Douglas Aircraft Co., Inc.*, 60 F. Supp. 985, 988 (S.D. Calif. 1945).

Furthermore, the *Spaulding* decision discusses the ability of Congress to restrict the expenditure of appropriated funds or to place certain conditions on the use of funds made available by its actions:

> Congress in making appropriations has the power and authority not only to designate the purpose of the appropriation, but also the terms and conditions under which the executive department of the government may expend such appropriations. *Spaulding v. Douglas Aircraft Co., Inc., supra*, 60 F. Supp. at 988.

The appropriation of funds and the designation of certain monies for particular purposes are powers granted to Congress in its capacity as representatives of the people. The policy regarding the use and availability of funds should be a direct reflection of the wants and desires of those who have elected their Senators and Congressmen. Policy decisions should not be made by the court.

> (I)n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common-sense and the public weal." Our Constitution vests such responsibilities in the political Branches. *Tennessee Valley Authority v. Hill*, 98 S. Ct. 2279, 2302 (1978).

As an integral part of an appropriations measure, the Hyde

Amendment comes within the exclusive authority granted Congress to appropriate the public funds. The restrictions and conditions contained in the Hyde Amendment are as much a part of the appropriations to the Department of Health, Education and Welfare as the specific designations of the amounts of funds made available. Congress now must answer to the people as to whether these appropriations, with the accompanying restrictions and conditions, are what the voting public desires. If the measure is repugnant to the wishes of a particular representative's constituency, that representative may face the consequences at the next election.

On the other hand, if Congress is to answer to the judiciary in regard to appropriations, those policies desired by the voters may not be carried out. If this is the case, the power of appropriation no longer belongs exclusively to Congress and the authority which was intended to be vested in the legislative branch of our government would now be shared with the branch intended to enforce our laws.

Several suits have been brought in various federal courts testing the constitutionality of the Hyde Amendment. In the case of *Doe v. Matthews*, 420 F. Supp. 865 (D.N.J. 1976), Judge Biunno dealt with the separation of powers and appropriation by the judiciary. The Court was faced with the practical question of what happens if a portion of an appropriations measure is struck down as unconstitutional:

> (N)one of the cases relied on deal with one obvious question raised by the challenge to the Hyde Amendment, namely, the impact of the provision in the United States Constitution, Article I, §9, cl. 7 that:
>
> "No money shall be drawn from the Treasury but in consequence of appropriations made by law."
>
> Neither the complaint, the moving papers nor the initial brief discusses this question. Yet it cannot be avoided, because, on the record before the Court, the Congress simply has not appropriated any monies for fiscal 1977 to reimburse Medicaid States with a federal share for elective abortions.

For this question, a declaratory judgment that the Hyde Amendment is unconstitutional or enjoining Secretary Mathews of HEW from enforcing it, or both (as asked by the complaint) would be a futile and meaningless judgment. This is because of the fact that if Secretary Mathews were to ignore the Hyde Amendment pursuant to such a judgment, the Secretary of the Treasury would remain bound to observe the Hyde Amendment and to refuse to draw any monies out of the Treasury for payment of a federal share to a Medicaid State on account of elective abortions...

Similarly, it has long been the law, as it must be in the light of the clear and explicit languge of the constitution, that no officer may pay an obligation of the United States without an appropriation for that purpose, and no mandamus may issue to that end. *Reeside v. Walker,* 52 U.S. (11 How.) 623 (1850); *Collins v. United States,* 15 Ct. Cl. 22 (1879); *Contracts of Extension Capitol,* Op. Atty. Gen. 28 (1853).

Even if the Secretary of the Treasury were joined as an indispensable party for the remedy sought, a serious question arises whether any court can direct him to draw monies from the Treasury when there is no appropriation made by law. *Doe v. Matthews, supra,* F. Supp. at pp. 870-871.

Thus, even in the face of a binding obligation or in the case of funds unconstitutionally obtained, no court may order monies paid from the Treasury where Congress has not made an appropriation. *Reeside v. Walker, supra; Stitzel-Weller Distillery v. Wickard,* 118 F 2d 19 (1941); *Doe v. Mathews, supra.* See *Cincinnati Soap Co. v. United States,* 301 U.S. 308 (1937); *Spaulding v. Douglas Aircraft Co., Inc., supra.* Accord *California State Employees Association v. Flournoy,* 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (1973), *cert. denied,* 414 U.S. 1093 (1974) (California law); *Starkweather v. Blair,* 245 Minn. 371, 71 N.W. 2d 869 (1955) (Minn. law); *Mallory v. Barrera,* 544 S.W. 2d 556 (Mo. 1976) (federal funds in state treasury); *Opinion of the Justices,* 381 A 2d 1204 (N.H. 1978) (New Hampshire law as applied to federal funds in state treasury); *Shapp v. Sloan,* 367 A 2d 791 (Pa. Cmwlth 1976) (Pennsylvania law regarding federal funds in state treasury). *Cf. Wheeler v. Barrera,*

417 U.S. 402 (1974) (federal law cannot compel a state to violate its constitution). The rule is a laudable one, for it lies at the heart of the concept of separation of powers deemed essential by Alexander Hamilton in *The Federalist,* No. 78.

> For I agree that "there is no liberty if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments...A Hamilton, *The Federalist,* No. 78 (Wright ed. 1961) at 491 (footnote omitted).

Since the Hyde Amendment takes the form of a restriction on the expenditure of funds, some may argue that this provision is exempted from the exclusive authority of Congress. As early as 1888, however, this Court found that Congress has the right to place such restrictions as part of its appropriations power:

> The absolute control of the monies of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people, and it is entirely within the power of Congress to indicate the class of persons who shall not be paid out the general appropriations, but shall come to Congress for relief. *Hart's Case,* 16 Ct. Cl., 484 (1880), *aff'd.,* 118 U.S. 62 (1888).

See also, *Harrington v. Bush,* 553 F 2d 190 (D.C. Cir. 1977).

The judiciary is also restricted from considering the equities which may be involved in regard to whether it should rule on appropriations or budget authority:

> (A)ny order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress. Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equi-

ties. *National Association of Regional Councils v. Costle,* 564 F 2d 583, 589 (D.C. Cir. 1977).

Based upon the separation of powers granting the exclusive authority for the appropriation of funds to Congress, any action taken in regard to the Hyde Amendment would amount to appropriation by the Judiciary.

The Court must bear in mind the possible results of any action striking down this appropriations act. If the entire act is considered invalid on a constitutional basis, no monies will be available for any abortions. This appropriation makes available the funds for abortions left unrestricted by the Hyde Amendment as well as restricting the use of funds for other abortions. Therefore, a finding that this act is unconstitutional will limit the availability of all funds and not make any funds available for "medically necessary" abortions, as the District Court ordered.

The District Court assumed that it could strike down only the Hyde Amendment portion of the Department of Health, Education and Welfare appropriations act. This action on the Hyde Amendment alone was, in essence, an appropriation by the District Court of monies for abortions presently categorized under the Hyde Amendment restrictions. Such an appropriation by the judiciary is strictly forbidden by our Constitution. See *Spaulding v. Douglas Aircraft, supra,* 60 F. Supp. at 988, where the Court found no justifiable controversy in a declaratory judgment action which requested that the Renegotiation Act be declared unconstitutional because, the Court ruled, Congress, in making appropriations, had power not only to designate the purpose of appropriation, but also conditions under which the executive department of our government could expend the appropriations.

The Hyde Amendment is a part and parcel of the appropriations act and cannot be read apart from the appropriation of the funds which it restricts. The District Court in *Doe v. Matthews, supra,* was reluctant to consider the Hyde Amendment apart from the rest of the act:

> Whether the Hyde Amendment is a "rider" (a term usually

> describing a provision of law unrelated or not germane to the bill to which it is attached) or a floor amendment, is by no means clear. In any event, whatever the legislative mechanism was, the challenged provision is claimed to have been passed by both Houses of Congress, sent to the President who vetoed the entire bill, and enacted into law by a two-thirds vote of both Houses of Congress. The Constitution of the United States does not require the Congress to limit each Bill to one object, or to state that object in its title. It does not extend to the President the authority to veto one item of an appropriations law, or to the Congress the authority to override the veto of one or more of such items. It does not authorize the mechanism of the conditional veto. A bill either becomes a law, as a whole, or it is no law at all. *Doe v. Matthews, supra,* 420 F. Supp. at 868.

Whether the Hyde Amendment is considered separately or as part of the appropriations act, this Court will be faced with a dilemma which it need not consider if the issue of funding is placed where it belongs: in the hands of Congress.

The wisdom of leaving the entire responsibility to the Congress for levying taxes and determining expenditures is the backbone of fiscal responsibility for this country. Congress will only appropriate money when it has determined that there will be sufficient income to make the appropriation. To allow the judiciary to increase the budget could result in economic chaos. It is for this very reason that the separation of the powers prevents the judiciary from increasing expenditures.

In a time when fiscal responsibility is paramount in the public's mind, the judiciary should not usurp the power of the legislature to set the balance of the income and expenditure. This is particularly true regarding abortion funding because of the strong division which exists in the country regarding its propriety. With the judiciary under increasing attack from all quarters, this question should be left to Congress.

CONCLUSION

The state is not required by the Constitution to attack every problem or not attack it at all. *Dandridge v. Williams, supra.* In addition, as long as a classification has some reasonable basis, it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1910). "The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago,* 228 U.S. 61, 69-70 (1912). "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland,* 366 U.S. 420, 426 (1960).

In the instant case, the interests of the state are advanced by the classifications created by this statute. Indeed, most of the conditions permitting restricted funding have been implicitly approved in *Maher, Beal* and *Poelker.* Even if this Court should agree, however, that the challenged regulation should not exist or should be less restrictive, that opinion should not prevent the upholding of this regulation because this Court should not strike down a law "because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson v. Lee Optical of Oklahoma, Inc., supra,* 348 U.S. at 488. Such decisions are best rendered in the political arena. This court should continue to heed, therefore, the following admonition made by the Court in *Maher v. Roe, supra,* 97 S. Ct. at 2385-2386.

> ...Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." (Citation omitted.)

In conclusion, we emphasize that our decision today does

not proscribe government funding of non-therapeutic abortions. It is open to Congress to require provision of medicaid benefits for such abortions as a condition of state participation in the mediaid program. Also, under Title XIX as construed in *Beal v. Doe, supra,* Connecticut is free — through normal democratic processes — to decide that such benefits should be provided. We hold only that the Constitution does not require a judicially imposed resolution of these difficult issues.

Accordingly, Amicus Curiae respectfully urge this Honorable Court to reverse the decisions below.

Respectfully submitted,

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APPENDIX

"A PROSPECTIVE STUDY OF THE EFFECTS OF INDUCED ABORTION ON SUBSEQUENT REPRODUCTIVE FUNCTION"

Summary of Progress September 1, 1975 - May 31, 1978
Contract No. NO1-MD-6-2802

Preliminary analyses of first subsequent pregnancies among 20,306 women who had an induced abortion during the time period July 1, 1970 through June 30, 1971 and an equal number of matched control women who had a live birth during the same time period indicates that the two groups experienced different outcomes for selected pregnancy related variables.

Measures related to birthweight and length of gestation were calculated for single live births. The rates of occurrence of selected maternal conditions present during pregnancy were calculated for those pregnancies which resulted in a live birth. This base was chosen to avoid counting more than once women who had multiple deliveries. Congenital malformation rates and rates of complications of labor were calculated for total live births. All rates have been adjusted for maternal age at the time of the first subsequent pregnancy following the index event.

Preliminary findings based upon provisional data indicate:

1. The control group had 2.5 times as many live births at the first subsequent event following the index event as the study group.

2. The spontaneous fetal death ratio among the study group was nearly double that of the control group.

3. The rate of low birthweight live births (2500 grams or less) was higher among the study group.

4. The rate of early gestational age infants (28 weeks or less) was higher among the study group.

5. The rate of complications of labor was higher among the study group.

6. The rate of abnormal uterine bleeding, eclampsia and pre-eclampsia was higher among the study group.

7. There was essentially no difference in the rate of congenital malformations between the two groups.

8. The mean birthweight was lower for the study group.

9. There was no difference in the mean gestation length between the two groups.

Our preliminary findings are summarized in the following table.

FIRST SUBSEQUENT PREGNANCY AFTER INDEX EVENT

PROVISIONAL DATA

Characteristic	Study Group	Control Group
Number of Women	20,306	20,306
Number of Single Live Births	2,867	7,038
Number of Pregnancies Resulting in a Live Birth	2,899	7,102
Number of Total Live Births	2,930	7,162
Number of Total Spontaneous Fetal Deaths	256	338
Spontaneous Fetal Death Ratio (per 1,000 Total Live Births)	87.3	47.2
For Single Live Births, Rate of Low Birthweight Infants (2500 grams or less) adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	79.1	59.8
For Single Live Births, Rate of Early Gestation Infants (28 weeks or less) adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	10.0	6.0
For Total Live Births, Rate of Complications of Labor adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	94.7	51.7
For Pregnancies Resulting in a Live Birth, Rate of Abnormal Uterine Bleeding, Eclampsia and Preeclampsia adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	20.5	13.9
For Total Live Births, Rate of Congenital Malformations adjusted for Maternal Age at Time of Subsequent Live Birth (per 1,000 Live Births)	9.9	9.6
For Single Live Births, Mean Birthweight in Grams	3265.2	3346.9
For Single Live Births, Mean Gestation in Days	278.9	279.6

(continued)

QUARTERLY REPORT
MEDICAID FINANCED ABORTIONS UNDER P.L. 95-205
July 1, 1979 - September 30, 1979

A total of 1,535 Medicaid abortions with Federal Financial Participation were reported by 27 jurisdictions for the period July 1, 1979 through September 30, 1979 (Chart A). Twenty-six jurisdictions reported that no abortions meeting the criteria of P.L. 95-205 were financed during this period. The 1,535 abortions reported for this quarter are an increase over the 1,312 reported for the April-June 1979 Quarter. This increase is principally due to the increase in the number of abortions reported by Massachusetts. This State reported 671 abortions for the July-September 1979 Quarter in contrast to 211 abortions for the April-June 1979 Quarter.

Since the regulations for Federal financing of Medicaid abortions were issued on February 14, 1978, 6,180 abortions have been reported by 44 juridictions (Chart B). Nine jurisdictions (California, District of Columbia, Hawaii, Louisiana, Michigan, Minnesota, Montana, Puerto Rico, and Virgin Islands) have reported funding no abortions that meet the criteria of the legislation cited above.

Justifications were provided for 4,265 abortions of the 6,180 reported abortions. States do not always provide the reasons for abortions when submitting quarterly reports. The distribution

among the jurisdiction categories during the last five reporting periods has been reasonably consistent. The distribution of these categories over the five quarters is: 82 percent justified on the basis of danger to the life of the woman, 15 percent due to "severe and long lasting damage to her physical health," and three percent due to "rape or incest" (Chart C).

There is no reliable information available on the number of Medicaid abortions financed without Federal matching, nor on the number of Medicaid abortions paid for prior to February 14, 1978.

For more information on these data, please contact Richard Beisel, Medicaid Program Data Branch (301) 597-1417.

Office of Research, Demonstrations and Statistics
Health Care Financing Administration
November 14, 1979

CHART A

NUMBER OF REPORTED MEDICAID ABORTIONS, BY STATE AND JUSTIFICATION FOR ABORTION, FINANCED WITH FEDERAL MATCHING FUNDS

P.L. 95-205, July 1, 1979 - September 30, 1979

STATE [2]	Total Number of Abortions Reported	JUSTIFICATION FOR ABORTION		
		Life of Woman Endangered	Severe and Long Lasting Damage to Health of Woman	Rape or Incest
Total	1,535	442	126	16
Alabama	23	10	13	0
Alaska	0	-	-	-
Arizona (2)				
Arkansas	3	3	-	-
California	0	-	-	-
Colorado	46	45	1	-
Connecticut	135	135	-	-
Delaware	0	-	-	-
Dist. of Columbia	0	-	-	-
Florida	0	-	-	-
Georgia	5	1	4	0
Guam	0	-	-	-
Hawaii	0	-	-	-

(continued)

STATE [2]	Total Number of Abortions Reported	JUSTIFICATION FOR ABORTION		
		Life of Woman Endangered	Severe and Long Lasting Damage to Health of Woman	Rape or Incest
Idaho	0	-	-	-
Illinois (3)	24	20	4	0
Indiana	0	-	-	-
Iowa	8	7	-	1
Kansas	5	3	-	2
Kentucky	1	0	1	0
Louisiana	0	-	-	-
Maine	0	-	-	-
Maryland	36	13	23	-
Massachusetts (4)	671	N/A	N/A	N/A
Michigan	0	-	-	-
Minnesota (3)	0	-	-	-
Mississippi	1	-	1	-
Missouri	0	-	-	-
Montana	0	-	-	-
Nebraska	0	-	-	-
Nevada	0	-	-	-
New Hampshire	1	1	-	-
New Jersey	27	-	27	-
New Mexico	2	2	-	-
New York	98	58	39	1
North Carolina	4	1	3	-
North Dakota	0	-	-	-
Ohio (4)	280	N/A	N/A	N/A
Oklahoma	73	73	-	-
Oregon	17	2	3	12
Pennsylvania	29	29	-	-
Puerto Rico	0	-	-	-
Rhode Island	1	1	-	-
South Carolina	1	1	-	-
South Dakota	0	-	-	-
Tennessee	1	-	1	-
Texas	0	-	-	-
Utah	0	-	-	-
Vermont	3	-	3	-
Virgin Islands	0	-	-	-
Virginia	10	10	-	-
Washington	30	27	3	-
West Virginia	0	-	-	-
Wisconsin	0	-	-	-
Wyoming	0	-	-	-

(1) Data for this report are based on HCFA 64.96 forms submitted by the reporting States.

(2) Arizona has no Medicaid Program.

(continued)

(3) Illinois and Minnesota reported 378 and 2 abortions, respectively, but Region V auditors disallowed the claims by both States, and determined that the Illinois figure should be 24 abortions and the figure for Minnesota should be zero abortions.

(4) Massachusetts and Ohio did not report reasons for abortions in the July-September 1979 period.

N/A - Not Available.

CHART B

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS BY STATE AND REPORTING

Period, February 14, 1978 - September 30, 1979

STATE [1]	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 - Sept. 30, '79
Total	6,180	760	728	840	1,005	1,312	1,535
Alabama	69	8	8	7	10	13	23
Alaska	94	94	-	-	-	-	-
Arkansas	15	6	3	-	-	3	3
California (2)	-	-	-	-	-	-	-
Colorado	338	81	40	49	65	57	46
Connecticut	300	47	30	29	37	22	135
Delaware	1	-	-	-	-	1	-
Dist. of Columbia	-	-	-	-	-	-	-
Florida	18	10	2	1	3	2	-
Georgia	17	3	6	3	-	-	5
Guam	1	-	-	1	-	-	-
Hawaii	-	-	-	-	-	-	-
Idaho	22	7	8	5	1	1	-
Illinois (3)	343	124	81	59	33	22	24
Indiana	4	2	2	-	-	-	-
Iowa	13	-	-	4	-	1	8
Kansas	23	-	-	3	5	10	5
Kentucky	6	-	-	-	3	2	1
Louisiana	-	-	-	-	-	-	-
Maine	8	1	1	1	4	1	-
Maryland	258	40	50	42	52	38	36
Mass.	1,137	-	-	24	231	211	671
Michigan	-	-	-	-	-	-	-
Minnesota	-	-	-	-	-	-	-
Mississippi	13	12	-	-	-	-	1
Missouri	48	-	-	48	-	-	-
Montana	-	-	-	-	-	-	-
Nebraska	1	-	-	-	-	1	-
Nevada	2	-	-	-	-	2	-
New Hampshire	6	-	1	-	3	1	1
New Jersey	150	34	22	42	21	4	27
New Mexico	8	2	-	3	1	-	2

(continued)

STATE [1]	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 - Sept. 30, '79
New York	413	54	49	59	72	61	98
North Carolina	17	8	1	-	1	3	4
North Dakota	1	1	-	-	-	-	-
Ohio	1,659	38	327	386	272	296	280
Oklahoma	201	10	9	19	39	51	73
Oregon	86	7	2	22	19	19	17
Pennsylvania	696	34	53	21	115	444	29
Puerto Rico	-	-	-	-	-	-	-
Rhode Island	3	-	1	-	1	-	1
South Carolina	31	12	7	2	3	6	1
South Dakota	1	1	-	-	-	-	-
Tennessee	21	19	-	-	-	1	1
Texas	17	7	5	2	3	-	-
Utah	3	-	2	-	1	-	-
Vermont	16	-	3	3	5	2	3
Virgin Islands	-	-	-	-	-	-	-
Virginia	28	2	3	4	5	4	10
Washington	43	-	-	-	-	13	30
West Virginia	3	3	-	-	-	-	-
Wisconsin	45	33	11	1	-	-	-
Wyoming	1	-	1	-	-	-	-

(1) Arizona has no Medicaid Program

(2) California has reported abortions involving Federal Financial Participation (FFP) to the Health Care Finance Administration (HCFA). However, there were claims for abortions submitted on amended reports to the Region IX office. The Regional Office disallowed the claims and called for an audit. Should the audit find a significant number of these amended reports to be legally reimbursed under the Medicaid program, HCFA will reflect the data in future reports.

(3) The State of Illinois reported 1,013 abortions for the period from April 1, 1979 - June 30, 1979. After a review conducted by the Region V Medicaid Bureau, it was determined that only 22 met the criteria under P.L. 95-205 for Federal matching funds. Also, for the period July - September 1979, Illinois and Minnesota, reported 378 and 2 abortions, respectively, but Region V auditors disallowed the claims by both States, and determined that the Illinois figure should be 24 abortions and the figure for Minnesota should be zero abortions.

CHART C

TOTAL NUMBER OF REPORTED MEDICAID ABORTIONS, BY JUSTIFICATION FOR ABORTION

February 14, 1978 - September 30, 1979

Justification for Abortion	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 Mar. 31, '79	Apr. 1, '79 - June 30, '79	July 1, '79 Sept. 30, '79
Total No. of Reported Abortions	4,265 (1)	666	728	768	736	783	584

(continued)

Justification for Abortion	Total	Feb. 14, '78 - June 30, '78	July 1, '78 - Sept. 30, '78	Oct. 1, '78 - Dec. 31, '78	Jan. 1, '79 - Mar. 31, '79	Apr. 1, '79 - June. 30, '79	July 1, '79 - Sept. 30, '79
Life of Woman Endangered	3,507	495	563	651	654	702	442
Severe & Long Lasting Damage to Health of Woman	650	147	153	92	68	64	126
Rape or Incest	108	24	12	25	14	17	16

(1) Figures will not add to toals of Chart B because Alaska did not report the reasons for abortions in the February - June 1978 period, Massachusetts and Missouri did not report the reasons for abortions in the October - December 1978 period, Massachusetts, Illinois and Vermont did not report the reason for abortions in the January - March 1979 period, Illlinois, Massachusetts and Ohio did not report the reasons for abortions in the April-June 1979 period, also Massachusetts and Ohio did not report the reasons for abortions in the July-September period.

MAJOR REASON FOR SEEKING ABORTON GIVEN BY 400 PATIENTS

	Saline [%]	Curettage [%]
School	17.5	7.0
Career, personal freedom	11.5	7.5
Medical complications	4.5	10.0
Financial strain	19.5	15.0
Unmarried	9.0	8.5
Too young	6.0	11.0
Fear of social disgrace	5.0	1.5
Family already completed	3.5	13.5
Shakey relationship with man involved	8.0	9.0
Children too close in age	2.0	4.0
Possession of own children jeopardized	1.0	1.0
Parental advice	2.0	0.5
Never wants children	0.5	1.0
Not fit to be a mother	1.5	3.0
Unwilling intercourse	-	0.5
Plans to marry abandoned	0.5	-
Too early in marriage	-	2.0
Too old	-	1.5
Didn't want to hurt family	4.5	0.5
Other	3.5	3.0

Source: Kerenyi, et al, "Reason for Delayed Abortion: Results of 400 Interviews," 117 American Journal of Obstetrics and Gynecology, 299, 307 (1973).